82-1100

No.

Supreme Court, U.S.
FILED
DEC 28 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

FRED J. GLUSMAN and INTERNATIONAL DRESS SHOP, INC.,

Appellants,

v.

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION; and STATE OF NEVADA GAMING CONTROL BOARD,

Appellees.

On Appeal From The Supreme Court Of Nevada

JURISDICTIONAL STATEMENT

STEPHEN M. GLYNN
JAMES A. WALRATH
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

GEORGE E. GRAZIADEI
SCOTT MICHAEL CANTOR
101 Convention Center Drive
Las Vegas, Nevada 89109
(702) 731-2711
Attorneys for Appellants

Date: December 29, 1982

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

Are the Nevada statutory and regulatory standards, which will be used by Nevada gaming authorities to determine whether appellant's clothing businesses should be shut down, unconstitutionally vague and indefinite?

TABLE OF CONTENTS

PAGE

Opinion below 1

Basis for jurisdiction 1

Provisions of law and regulations involved 2

Manner of raising the federal questions 5

Statement of the case 6

The substantial federal questions discussed 7

Conclusion 9

Appendix

Opinion of the Supreme Court of Nevada .....App. 1

Notice of Appeal to Supreme Court of United States .....App. 19

Certificate of Clerk of the Supreme Court of the United States as to Notice of Appeal .....App. 21

TABLE OF AUTHORITIES

Cases

PAGE

A. B. Small Co. v. American Sugar Refinery Co., 267 U.S. 233 (1925) 7

Baggett v. Bullitt, 377 U.S. 360 (1964) 8

City of Mesquite v. Aladdin's Castle, Inc., ... U.S. ....., 71 L.Ed.2d 152 (1982) 8-9

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 8

Grayned v. City of Rockford, 408 U.S. 104 (1972) 7

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 8

Statutes

Nev. Rev. Stat. §463.160(8) (1979) 2, 7

Nev. Rev. Stat. §463.170 (1979) 3

Nev. Rev. Stat. §463.210 (1979) 4

28 U.S.C. §1257(2) 2

28 U.S.C. §2101(c) 2

§463.170(2) 5, 7

Regulations

Reg. 3.090 Nevada Gaming Commission and State Gaming Control Board 4

§3.090(1)(b) 7

In the
Supreme Court of the United States

OCTOBER TERM, 1982

NO.

FRED J. GLUSMAN and
INTERNATIONAL DRESS SHOP, INC.,
Appellants,

v.

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION; and STATE OF NEVADA GAMING CONTROL BOARD,
Appellees.

On Appeal From The Supreme Court Of Nevada

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Nevada, which appears in the appendix hereto, will be reported at 98 Nevada Reports, but is presently unreported.

BASIS FOR JURISDICTION

The decision of the Supreme Court of Nevada, generally upholding the constitutionality of gaming laws and regulations as applied to non-gaming businesses, was entered on September 30, 1982. A notice of appeal was filed on November 17, 1982 and is attached hereto in the appendix.

This appeal is docketed within 90 days of the final decision below. 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Appellant's application to this Court for a stay of administrative proceedings pending this appeal was denied by Justice Rehnquist on November 18, 1982 in No. A-450.

PROVISIONS OF LAW AND REGULATIONS INVOLVED

Nev. Rev. Stat. §463.160(8) (1979).

> "8. If the premises of a licensed gaming establishment are directly or indirectly owned or under the control of the licensee therein, or of any person controlling, controlled by, or under common control with the licensee, the commission may, upon recommendation of the board, require the application of any business or person for a determination of suitability to be associated with a gaming enterprise if the person or business:
>
> (a) Does business on the premises of the licensed gaming establishment;
>
> (b) Does business with the licensed gaming establishment as a junket representative or ticket purveyor; or
>
> (c) Provides any goods or services to the licensed gaming establishment for a compensation which the board finds to be grossly disproportionate to the value of the goods or services.
>
> If the Commission determines that the business or person is unsuitable to be associated with a gaming enterprise, the association must be terminated. Any agreement which entitles a business other than gaming to be conducted on the premises, or entitles a person or business other than gaming to conduct business with the licensed gaming establishment as

set forth in paragraph (b) or (c) of this subsection, is subject to termination upon a finding of unsuitability of the business or of any person associated therewith. Every such agreement must be deemed to include a provision for its termination without liability on the part of the licensee upon a finding by the commission that the business or any person associated therewith is unsuitable to be associated with a gaming enterprise. Failure expressly to include that condition in the agreement is not a defense in any action brought pursuant to this section to terminate the agreement. If the application is not presented to the board within 30 days following demand or the unsuitable association is not terminated, the commission may pursue any remedy or combination of remedies provided in this chapter."

Nev. Rev. Stat. §463.170 Qualifications for license or finding of suitability. (1979).

"1. Any person who the commission determines is qualified to receive a license or be found suitable under the provisions of this chapter, having due consideration for the proper protection of the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and the declared policy of this state, may be issued a state gaming license or found suitable. The burden of proving his qualification to receive any license or be found suitable is on the applicant.

2. An application to receive a license or be found suitable shall not be granted unless the commission is satisfied that the applicant is:

(a) A person of good character, honesty and integrity;

(b) A person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming,

or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto; and

(c) In all other respects qualified to be licensed or found suitable consistently with the declared policy of the state."

Nev. Rev. Stat. §463.210 Investigation of applicant; order recommending approval, denial of license. (1979)

"1. Within a reasonable time after filing of an application and such supplemental information as the board may require, the board shall commence its investigation of the applicant and shall conduct such proceedings in accordance with applicable regulations as it may deem necessary.

2. The board shall make its order, either recommending approval or denial of an application; not longer than 90 days after the application and supporting data are completed and filed with the board. In the event denial of an application is recommended, the board shall prepare and file with the commission its written reasons upon which the order is based.

3. The board shall have full and absolute power and authority to recommend denial of any application for any cause deemed reasonable by the board."

Regulation 3.090 of Regulations of the Nevada Gaming Commission and State Gaming Control Board. Standards for commission action.

"1. No license, registration, finding of suitability, or approval shall be granted unless and until the applicant has satisfied the commission that the applicant:

(a) Is a person of good character, honesty and integrity;

(b) Is a person whose background, reputation and associations will not result in adverse publicity for the State of Nevada and its gaming industry; and

(c) Has adequate business competence and experience for the role or position for which application is made.

2. No license, registration, finding of suitability, or approval shall be granted unless and until the applicant has satisfied the commission that the proposed funding of the entire operation shall be (a) adequate for the nature of the proposed operation, and (b) from a suitable source. The suitability of the source of funds shall be determined by the standards enumerated in paragraph 1(a), (b) and (c) above.

(Adopted 10/75.)

MANNER OF RAISING THE FEDERAL QUESTIONS

Appellant originally sought a declaration of the unconstitutionality of the Nevada statutes involved by filing a complaint for such relief in the Eighth Judicial Court of Clark County, Nevada. Appellant asserted in his complaint (¶XII) that the statute for determining whether appellant's business would merit a "finding of suitability" was unconstitutionally vague. The lower court ultimately denied declaratory and injunctive relief in a February 27, 1981 ruling which upheld the constitutionality of the statutory and regulatory scheme.

The question of the vagueness of the Nevada regulatory scheme was raised on appeal to the Supreme Court of Nevada. That Court expressly considered and rejected appellant's federal constitutional claims in its opinion of September 30, 1982. The Court determined in particular that §463.170(2), Nev. Rev. Stat., which defines what a "suitable" business is, "describes with specificity the standards of conduct applicable to a determination of suitability. . . ."

STATEMENT OF THE CASE

Appellant has been operating women's apparel stores in Las Vegas, Nevada for some 15 years. The stores are located in two Las Vegas hotels, the Hilton (three stores) and the Stardust (one store). He has been doing business at these locations for more than a dozen years and his leases have been renewed as necessary. Both the Hilton and the Stardust have specified areas for gaming called "casinos." Glusman's stores are situated several hundred feet from the casinos at both hotels. In none of Glusman's store areas is gambling permitted; moreover, the leases restrict the business of the shops to clothing sales. Appellant is not associated in any way with either the Hilton or the Stardust gambling enterprises; he does not share in their proceedings; and he has no control over them or anyone involved with them.

Despite appellant's total non-involvement in any gaming enterprise, in June, 1980 the Nevada Gaming Commission ordered him to seek a "finding of suitability to be associated with a licensed gaming enterprise" upon pain of termination of the leases at both hotels. As a result, petitioner commenced his proceedings in the District Court for Clark County, Nevada, in June, 1980 to enjoin the Commission's order and to have the relevant Nevada statute declared unconstitutional. Although preliminary injunctive relief was granted, the District Court subsequently denied such relief on final hearing. An appeal was taken to the Nevada Supreme Court, which subsequently upheld the validity of the statutory scheme.

THE SUBSTANTIAL FEDERAL QUESTIONS DISCUSSED

The statutory standards for determining Fred Glusman's "suitability" to continue what he has been doing for the past 15 years are unduly vague. These attempts to define "suitability" deprive him of adequate notice of the possible bases of adverse agency action. Because of their vagueness they fail to give persons of common intelligence a reasonable opportunity to know when their conduct and activities may subject them to adverse government action. *Grayned* v. *City of Rockford*, 408 U.S. 104, 109-109 (1972); *A.B. Small Co.* v. *American Sugar Refinery Co.*, 267 U.S. 233, 239 (1925). Additionally, the absence of explicit standards for agency action invites arbitrary and discriminatory enforcement of the law. *Grayned, supra.*

The vagueness of the "suitability" standard imposed by §463.160(8) initially appears in §463.170(2), which requires findings that an applicant is of good character, honesty and integrity (§463.170[2][a]), that the applicant's prior activities, reputation, habits and associations do not pose a threat to the public interest or enhance the dangers of unsuitable gaming practices (§463.170[2][b]), and that the applicant in all other respects is qualified to be found suitable, consistent with the declared gaming policy of the state. (§463.170[2][c]).

Supplementary regulations and guidelines do not add specificity to these overly general statutory standards, but instead broaden and confuse the concepts even more. Section 3.090(1)(b) of the Regulations requires a finding that the applicant's background, reputation and associations *will not result* in adverse publicity for the state and the gaming industry; section 3.090(1)(c) further requires that

the applicant demonstrate adequate business competence and experience.

Board guidelines dated January 1, 1977, provide that an applicant may be considered unsuitable if he fails to *satisfactorily explain* arrests (¶2); if he associates with, either socially or in business affairs, *persons of notorious* or *unsavory reputation* (¶5); if the applicant would *tend to reflect discredit* on the state and its gaming industry (¶9); and if the applicant lacks a *satisfactory* record of business ethics and competence (¶15).

These standards and guidelines are couched in meaningless generalities. They require "satisfactory" showings and explanations; they refer to vague "associations" with "notorious" or "unsavory" persons; they speak of unknown, future events, such as possibilities that an applicant's reputation *will result* in adverse publicity or will *tend to reflect* discredit on the industry.

Such meaningless civil and administrative standards have been condemned as unconstitutionally vague. *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) (which involved the imposition of penalties for "reprehensible" conduct and conduct "outrageous" to morality and justice); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) (which involved a potential loss of a public school teaching position if the applicant refused an oath, disclaiming to be a "subversive person"). The statutory scheme reminds one of the "gangster crime" voided by this Court in *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939) where the statute provided that a "gangster" was "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime . . . ."

Although the Nevada Supreme Court relied upon this Court's decision in *City of Mesquite* v. *Aladdin's Castle*

Inc., ... U.S. ....., 71 L.Ed.2d 152 (1982), it misunderstood this Court's reasoning. This Court merely held that the city in that case was free to give vague or ambiguous directions to investigative officials, to allow them to investigate whether a license applicant has any connection with criminal elements. The standard reviewed by this Court in *Mesquite* was not a standard by which the granting or denial of a license to do business would be determined. In the instant case, petitioner's right to continue his well-established business will be based upon a standard even more vague than the guideline reviewed in *Mesquite*. Moreover, the *Mesquite* standard applied to persons who *voluntarily applied to begin doing* business in the community. Here, the Nevada authorities propose to apply a far more vague standard to an established ongoing business.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

STEPHEN M. GLYNN
JAMES A. WALRATH
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

GEORGE E. GRAZIADEI
SCOTT MICHAEL CANTOR
101 Convention Center Drive
Las Vegas, Nevada 89109
(702) 731-2711

Attorneys for Appellants

Date: December 29, 1982

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 12946

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION and STATE OF NEVADA GAMING CONTROL BOARD,

Appellants,

vs.

FRED J. GLUSMAN and INTERNATIONAL DRESS SHOP, INC.,

Respondents.

No. 13217

FRED J. GLUSMAN and INTERNATIONAL DRESS SHOP, INC.,

Appellants,

vs.

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION and STATE OF NEVADA GAMING CONTROL BOARD,

Respondents.

(Filed September 30, 1982)

Consolidated appeal from order granting a preliminary injunction to respondents (Case No. 12946), and the order denying appellants' request for declaratory relief (Case

No. 13217). Eighth Judicial District Court, Clark County; Robert G. Legakes, Judge.

Reversed as to Case No. 12946; qualifiedly affirmed as to Case No. 13217.

Richard H. Bryan, Attorney General, Patricia W. Becker, Chief Deputy Attorney General, Carson City; Nikolas L. Mastrangalo, Deputy Attorney General, Clark County, for State of Nevada, State of Nevada Gaming Commission, and State of Nevada Gaming Control Board.

George E. Graziadei, Scott Michael Cantor, Las Vegas; Shellow, Shellow & Glynn, Milwaukee, Wisconsin, for Fred J. Glusman, and International Dress Shop, Inc.

Frank W. Daykin, Carson City, for Legislative Commission as Amicus Curiae.

OPINION

By the Court, STEFFEN, J.:

These consolidated appeals stem from issues involving the constitutional validity of Nevada gaming statute NRS 463.160(8)(a), hereinafter frequently referred to as "the statute",[1] and the jurisdiction of the district court to grant injunctive relief against the implementation thereof by state gaming authorities. After preventing enforcement of

[1] NRS 463.160(8)(a) is the applicable statute designated in effect in 1980. *See* NRS 467(2)(a).

the statute through issuance of a preliminary injunction, the district court determined that the legislation was constitutional and dissolved the injunction. We qualifiedly affirm the decision supporting the statute, but hold that the district court was without jurisdiction to enjoin its enforcement.

Frederick J. Glusman is an officer, director and sole shareholder of International Dress Shop, Inc. (International). International is engaged in the retail clothing business on the premises of the Las Vegas Hilton and Stardust hotels under the name of Fredde's Dress Shops. The International shops at the Hilton and Stardust have operated continuously under leases dated in 1968 and 1977, respectively.

Pursuant to the recommendation of the Nevada Gaming Control Board (Board), the Nevada Gaming Commission (Commission) issued an order directing Glusman to apply to the latter agency for a determination of suitability to be associated with a gaming enterprise. The statutory authority for the order, NRS 463.160(8)(a), reads as follows:

> If the premises of a licensed gaming establishment are directly or indirectly owned or under the control of the licensee therein, or of any person controlling, controlled by, or under common control with the licensee, the commission may, upon recommendation of the board, require the application of any business or person for a determination of suitability to be associated with a gaming enterprise if the person or business:
>
> (a) Does business on the premises of the licensed gaming establishment.

Glusman responded to the order by filing a complaint for declaratory and injunctive relief with the district court, asserting constitutional infirmity in the questioned statute.

The district court granted Glusman and International a preliminary injunction from which the State of Nevada, State of Nevada Gaming Commission and State of Nevada Gaming Control Board (the State) appealed under Case No. 12946. During the pendency of the latter appeal, the district court heard the complaint for declaratory relief and held against Glusman and International, thus prompting the appeal in Case No. 13217. (Hereafter, for purposes of this opinion, Glusman and International will alternatively be referred to as appellants).

In a major sense, the determination of the issues before us is dictated by the unique setting of the Nevada gaming industry. The peculiar nature of the gaming industry presents numerous concerns and problems of control, the resolution of which must be readily available to cognizant government authorities of this state. It has been clearly recognized by our earlier decisions that gaming longevity and vitality, under continuing state authority, are dependent upon effective control mechanisms which will assure appropriate deference to the health, safety and welfare of the citizenry. It is in that context that the Nevada Legislature has enacted legislation designed to provide effective and timely management of the gaming industry. NRS ch. 463.

We turn first to the question of the injunctive relief provided by the district court in Case No. 12946. Ordinarily this issue would fall prey to the mootness doctrine since the injunction has been dissolved. It is, however, within the inherent discretion of this Court to consider issues of substantial public importance which are likely to recur, in spite of any intervening event during the pendency of an appeal which has rendered the matter moot. In Re M, 473 P. 2d 737, 741-743 (Cal. 1970). The instant action poses such an issue and we deem it worthy of resolution.

Appellants attempt to posture themselves outside the purview of NRS 463.343 (the declaratory judgments provision of the gaming chapter) by disclaiming the status of "applicant, licensee or person found suitable." This contention is without merit. The statutory definition of "applicant"[2] clearly includes those who have been ordered to apply for a finding of suitability. Having so held, the question then arises as to whether appellants may nevertheless circumvent the dictates of NRS 463.343 by petitioning the district court under the Uniform Declaratory Judgments Act, NRS ch. 30, for declaratory relief and a stay of proceedings. The court below erroneously decided in the affirmative. The power of the legislature to restrict the availability of injunctive relief by the judiciary in gaming matters is well established. Gaming Control Bd. v. Dist. Ct., 82 Nev. 38, 409 P.2d 974 (1966). If appellants' position were to prevail, it would render NRS 463.343 selectively nugatory and allow effective avoidance of the prohibition against injunctive jurisdiction by the judiciary within statutorily defined areas of gaming. Accordingly, we hold that NRS 463.343(5)(b) effectively deprived the district court of jurisdiction to entertain injunctive relief to appellants and that the granting of such relief was error. Other issues on this point are defused by our holding and will not be discussed.

We are asked by the state to sidestep the constitutional issues raised by appellants in Case No. 13217 in deference to the doctrine of exhaustion of administrative remedies. The "exhaustion doctrine" is a salutary one which often fully and finally resolves disputes without need for litiga-

---

[2] NRS 463.0134 defines applicant as follows: "[A]ny person who has applied for or is about to apply for a state gaming license, manufacturer's license . . . or finding of suitability under the provision of this chapter. . . ."

tion. *First Am. Title Co.* v. *State of Nevada*, 91 Nev. 804, 543 P.2d 1344 (1975). In the instant case, appellants elected to disregard their administrative remedies under the apparent assumption that relief would be withheld by the administrative agencies. There is nothing in the record indicating appellants would have succumbed to a deaf ear had they sought exemption from a finding of suitability by the Commission. However, convinced of the unconstitutionality of NRS 463.160(B)(a), appellants opted to refuse any semblance of cooperation with the gaming authorities. Since we have held that a stay of proceedings was unavailable under NRS ch. 30, and since such relief was available pursuant to NRS 463.343(4), it follows that appellants should have proceeded under the latter statute and exhausted their administrative remedies.

Although we are reluctant to circumvent the exhaustion doctrine, there are compelling reasons for doing so in this case. The constitutional issues, which may have remained submerged through an administrative proceeding, have been met and decided by the district court in an adversary posture and were subjected to critical analysis in the context of an actual controversy. Further, it is within our discretion not to apply the exhaustion doctrine especially where the issues relate solely to the interpretation or constitutionality of a statute. *Cafferello* v. *U.S. Civil Serv. Com'n*, 625 F.2d 285 (9th Cir. 1980); *Frontier Airlines* v. *C.A.B.*, 621 F.2d 369 (10th Cir. 1980); *Public Utilities Comm.* v. *United States*, 355 U.S. 534 (1958). Finally the magnitude of the issues and the likelihood of their future recurrence justify a present judicial determination on the merits.

Appellants assert error by the district court in finding NRS 463.160(8)(a) constitutional on its face and as applied to them. We do not agree. We have long recognized, as a general possible, so as to be in harmony with the

constitution. *Copeland* v. *Woodbury*, 17 Nev. 337, 30 P. 1006 (1883); cited with approval in *Milchem Inc.* v. *District Court*, 84 Nev. 541, 445 P.2d 148 (1968). In the face of attack, every favorable presumption and intendment will be brought to bear in support of constitutionality. As previously held, "[a]n act of the legislature is presumed to be constitutional and should be so declared unless it appears to be clearly in contravention of constitutional principles." *State ex rel. Tidvall* v. *Eighth Judicial District Court*, 91 Nev. 520, 526; 539 P.2d 456, 460 (1975). In the case before us, the statute attacked must be considered in light of this state's policy regarding the gaming industry as expressed in NRS 463. 130(1). NRS 463.130(1) provides in pertinent part:

> (c) Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture or distribution of gambling devices and equipment.
>
> (d) All establishments where gaming is conducted and where gambling devices are operated, manufacturers, sellers and distributors of certain gambling devices and equipment in the state shall therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the state, to foster the stability and success of the gaming industry and to preserve the competitive economy and policies of free competition of the State of Nevada.[3]

As used in this provision, the word establishment is defined as "any premises wherein or whereon any gaming is done."[4]

---

[3] NRS 463.130 is the applicable statute designated in effect in 1980. *See* NRS 463.0129.

[4] NRS 463.0190 is the applicable statute designated in effect in 1980. *See* NRS 463.0148.

Appellants first contend that NRS 463.160(8)(a) is constitutionally infirm by reason of vagueness and overbreadth. The criterion under which we examine the assertion of vagueness is whether the statute "either forbids or requires the doing of any act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926) cited by this Court in *In re Laiolo*, 83 Nev. 186, 426 P.2d 726 (1967). Equally important in a facial challenge for vagueness is whether the statute impinges upon First Amendment freedoms. If not, a statute may be stricken as unconstitutionally vague only if it is found to be so "in all of its applications." *Hoffman Estates* v. *Flipside, Hoffman Estates*, ... U.S. ....., 71 L.Ed.2d 362 (1982). Further, our standard of review is less strict under a challenge for vagueness where the statute is directed at economic regulations. *Id.* at 371.

It is argued that the language of the statute fails to provide clarity of meaning or application, thereby subjecting those affected by the statute to uncertainty as to what constitutes acceptable conduct. It is true, of course, that the statute in question does not attempt to define the type of conduct which would actuate the investigatory machinery of the statute. Such definition is supplied, however, by reference to NRS 463.170(2).[5] The latter statute describes

---

[5] NRS 463.170(2) provides: An application to receive a license or be found suitable shall not be granted unless the commission is satisfied that the applicant is:

(a) A person of good character, honesty and integrity;

(b) A person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair or

(footnote continued)

with specificity the standards of conduct applicable to a determination of suitability and, by converse logic, that conduct which is inconsistent with suitability and which, if suspected, may prompt invocation of the investigation and qualifying aspects of NRS 463.160(8)(a).

Under the terms of the statute, any person or entity that does business on the premises occupied by a specified, licensed gaming establishment may be required to apply for a determination of suitability. The statute is precise. Regulation 1.050(12) of the Commission defines "premises" to mean "land together with all buildings, improvements and personal property located thereon." It is clear that the purpose of the statute is to provide a basis for investigating and qualifying or disqualifying as suitable, persons and businesses who choose to conduct non-gaming business operations on the premises of a gaming establishment. This purpose is both legitimate and reasonable. Human experience has shown gaming to be like quicksilver, and unless controls are complete and resourceful, the industry will be fraught with conditions of potential threat to its continued existence.

The United States Supreme Court recently sustained a city ordinance challenged for impermissible vagueness in the case of *City of Mesquite* v. *Aladdin's Castle, Inc.*, ... U.S. ....., 71 L.Ed.2d 152 (1982). There the city ordinance under fire was a licensing ordinance for coin-operated amusement establishments. The ordinance included a provision directing the chief of police to, *inter alia*,

---

(footnote continued)

illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto; and

(c) In all other respects qualified to be licensed or found suitable consistently with the declared policy of the state.

investigate an applicant's "connections with criminal elements." In reversing the court of appeals, the high court held:

> The Federal Constitution does not preclude a city from giving vague or ambiguous directions to officials who are authorized to make investigations and recommendations. There would be no constitutional objection to an ordinance that merely required an administrative official to review 'all relevant information' or 'to make such investigation as he deems appropriate' before formulating a [licensing] recommendation. *Id.* at 161.

In the instant proceeding, the statute is merely an investigative vehicle for confirming or dispelling concerns over the suitability of a person or business to conduct business operations on the same premises as a gaming establishment. The application and implicit investigation in connection therewith represent the total operative scenario attributable to NRS 463.160(8)(a). Obviously, the finding of suitability referred to in the statute is analagous to the ultimate licensing purpose of the city ordinance in *Mesquite*, and in both instances the eventual critical determination must result from the evaluation of facts obtained from the investigation and applied to well-defined criteria requisite to suitability or licensure. Therefore, we hold that the challenged statute is not susceptible to constitutional infirmity for vagueness since it purports to do nothing more than provide a basis for an investigation preliminary to a determination of suitability.

Appellants also contend that the statute is overbroad because it impermissibly regulates all type of businesses irrespective of any nexus with gaming. Generally, an overbreadth argument is only available for the purpose of challenging the validity of statutes which chill First Amendment rights. *Anderson* v. *State*, 562 P.2d 351 (Alaska 1977).

The Supreme Court in *Moose Lodge No. 107*, 407 U.S. 163, 168 stated:

> [w]hile the doctrine of 'overbreadth' has been held . . . to accord standing by reason of the 'chilling effect' that a particular law might have upon the exercise of the First Amendment rights, that doctrine has not been applied to constitutional litigation in areas other than those relating to the First Amendment.

In the case before us, none of appellants' First Amendment rights is impaired by reason of the questioned statute. Appellants do assert a denial of the First Amendment right to freedom of association, but such contention lacks merit. The type of association protected by the First Amendment is that which is related to the cherished right of freedom of speech, namely, "the freedom to associate for the promotion of political and social ideas." *Lewitus* v. *Colwell*, 479 F.Supp. 439 (D.C.Md. 1979), citing *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957). Accordingly, appellants' argument supporting constitutional infirmity for overbreadth cannot prevail since appellants failed to demonstrate that NRS 463.160(8)(a) has any impermissible impact on First Amendment freedoms. The statute here challenged is constitutional on its face.[6]

Appellants maintain that the statute represents an excessive, pervasive and therefore, unconstitutional exercise of the police power of the state. Appellants concede the vital role of gaming in the economy of the state and further acknowledge the right of the state to regulate and control the gaming industry consonant with the health,

---

[6] A facial challenge to a statute refers to a claim of invalidity of the entire statute and, if successful, would render it devoid of any valid application. Hoffman Estates v. Flipside, Hoffman Estate, *supra*.

safety and welfare of the public. They conclude, however, that since appellants operate dress shops and have no relationship to gaming, it is an unwarranted and unconstitutional intrusion on private rights to include them within the penumbra of the statute. It is unquestionably true that there are limitations on the police power of the state. Not only must the ends and means of the legislative enactment of the power be reasonable, but the objective of its exercise must be so manifestly in the public interest as to strongly justify any intrusion on the basic rights of individuals. *Goldblatt* v. *Town of Hempstead, New York*, 369 U.S. 590 (1962). However, appellants erroneously contend that NRS 463.160(8)(a) extends to all non-gaming businesses throughout the state. It does not. It applies only to businesses who elect to locate on certain premises shared by a gaming establishment. We hold that it is a reasonable exercise of the state's police power to subject businesses sharing premises with certain gaming establishments to a determination of suitability to be thus located. Having so held, however, does not dispose of the issue concerning the effect of the legislative scheme as applied to appellants.

Under the Nevada Gaming Control Act, the state is empowered to investigate and impose heavy sanctions, both civil and criminal, for the violation of Nevada's gaming laws. The statute in question facilitates the investigation of such violations or suspected violations by requiring investigatees to submit a detailed application and supportive information to gaming authorities. A finding of suitability by the Commission does not, however, constitute a license to participate in gaming. It merely provides official validation of the applicant's right to continue its non-gaming business on the premises shared by a gaming enterprise. The "finding of suitability" thus constitutes

a form of acquittal from whatever suspicions prompted the investigation. It leaves the "suitable" business in no better position than its non-gaming neighbors who remain impliedly "suitable" until such time as they might be called forward under the statute to justify their continued suitability. Indeed, an applicant who has survived the "suitability" process has sustained losses of time, effort and expense necessitated by the preparation and submission of a detailed application[7] required by the gaming authorities. More importantly, however, an applicant is subject to the payment of all investigative costs incurred by the state during the course of its investigation. NRS 463-331.

The combined effect of NRS 463.160(8)(a) and NRS 463.331(1) constitutes an unreasonable and fundamentally unfair burden on those who are required to submit to the qualifying procedures of the challenged statute. If the Commission determines that the applicant is "suitable," this simply means that the applicant is free of gaming involvement or impact and entitled to continue its non-gaming business on the same premises as a gaming establishment. The net effect to the non-gaming, "suitable" business could be financial decimation. We are thus faced with a situation where non-gaming applicants may be forced to underwrite their own financial demise even though they are totally free of gaming involvement. It is one thing to charge investigatory costs to those who are seeking licensure in the gaming industry; it is altogether different to subject one who at least ostensibly, has no re-

[7] The magnitude of the application is illustrated by the following requested information: Personal History Record (personal, marital, family, military, residence, employment and arrest information); and Invested Capital Questionnaire (detailed statement of all assets and liabilities).

lationship to gaming beyond that of sharing space with a gaming enterprise, to potentially prohibitive costs of investigation as a condition precedent to the continuance of a non-gaming business. To impose such costs on non-gaming applicants is unreasonable and beyond the legitimate public purposes of the law. It is an impermissible extension of the police power to predicate a non-gaming applicant's economic survival upon an ability or willingness to underwrite the costs of investigation. There is no essential symbiosis between NRS 463.160(8)(a) and NRS 463.331(1). The right to investigate under the former need not depend on the discriminatory subvention of the latter. It is not within the scope or purpose of gaming control to selectively impose on non-gamers the financial burden of gaming enforcement.

It is unavailing to argue that since the costs of investigation may be waived by the Commission[8] no harm may in fact result from the cost assessment potential under NRS 463.331(1). A selective waiver of costs would serve to intensify the arbitrary and discriminatory effect of the provision. We accordingly hold that the combined effect of the aforementioned statutes is an unreasonable intrusion on the private rights of appellants and others similarly situated. *See In re Kading*, 235 N.W.2d 409 (Wis. 1975). Consequently, we declare that part of NRS 463.331 (1) which assesses costs to applicants for findings of suitability an invalid and excessive use of the police power of the state.

Appellants insist that the district court erred in construing the statutory phrase, "associated with a gaming enterprise," to include them since they are assertedly

---

[8] Gaming Commission Regulation 4.070(8) provides that "the board may, in its discretion, waive payment of an investigative fee or cost."

not rationally tied to gaming. We disagree. The words of a statute should be construed, if reasonably possible, so as to accommodate the statutory purpose. *Malat* v. *Riddell*, 383 U.S. 564 (1966); *Cummings* v. *City of Las Vegas Municipal Corp.*, 88 Nev. 479, 499 P.2d 650 (1972). It is manifestly clear that the statute would be shorn of any meaningful purpose if it were held to apply only to those who were overtly associated in the gaming industry. Such persons or associates would require gaming licenses and would be subjected to investigation incidental thereto, thereby rendering NRS 463.160(8)(a) completely redundant. On the other hand, it poses no threat to reason to view the phrase "associated with" in the context of a spatial relationship or association, i.e., a joining together in the use of the entire space referred to in the statute as "the premises". Such a connotation is consonant with the legislative history of the statute as contained in the record, and promotes the legitimate purposes of the legislation.

Appellants next assert that NRS 463.160(8)(a) violates their constitutional right to privacy. We hold, however, that the legislature had a compelling interest in subjecting persons and businesses engaged in commerce and sharing space with gaming establishments to selective investigation and a finding of suitability. Such an interest is more than sufficient to sustain the statute in the face of a constitutional challenge based upon invasion of privacy assertions. *Plante* v. *Gonzales*, 575 F.2d 1119 (5th Cir. 1978). A person or entity voluntarily situated and doing business within such proximity of gaming establishments cannot override legitimate government control mechanisms by invoking a superior right of privacy. To do so would substantially frustrate the state's capacity to regulate the gaming industry. Furthermore, appellants' claim that disclosure of financial information violates their right to

privacy is also unfounded since any financial information obtained from appellants in the investigative process is confidential and immune from public disclosure by law. NRS 463.120(4). Any invasion of appellants privacy is minimal and therefore constitutionally permissible. *Whalen* v. *Roe*, 429 U.S. 589 (1977).

We next turn to the argument that NRS 463.160(8)(a) impairs appellants' contract rights without just compensation. This contention immediately fails as to the Stardust shop because the lease under which appellants maintain their business expressly covers the possibility of a suitability determination and termination of the lease in the event of denial. In any event, it is well established that the police power concerns of public health, safety and welfare may be invoked where reasonably necessary to control even contractually vested rights antecedent to regulating legislation without running afoul of the impairment of contracts clause of the state and federal constitutions. *Koscot Interplanetary, Inc.* v. *Draney*, 90 Nev. 450, 530 P.2d 108 (1974). It is equally settled that vested rights in a given profession or calling may be made subject to licensing or qualification enactments post dating such rights without running afoul of the impairments clause. *Collins* v. *Texas*, 233 U.S. 288 (1912). Here appellants enjoy whatever advantages exist in doing business in juxtaposition with gaming establishments. That spatial relationship will not be impaired if appellants are operating according to the laws of this state. We may not presume that a finding of suitability will be denied appellants if their business is consistent with their representations in this action. We accordingly hold that appellants have suffered no impairment of contracts as a result of the challenged statute.

Appellants' claim that NRS 463.160(8)(a) impairs their right to hold specific employment is also without merit. A finding of unsuitability by the Commission would not prevent appellants from engaging in the retail clothing business. It would only affect appellants' right to maintain their businesses in conjunction with gaming establishments at particular locations. This is not constitutionally prohibited. *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961). Given the apparent extent of appellants' investments in their longstanding retail business, we are not suggesting, however, that appellants' interests are not substantial. Still, the public welfare far transcends any interest on the part of appellants to retain their existing locations. We are not unmindful, however, of the obvious differences between one who seeks and is denied a gaming license and one who, after investing substantial time and money in business locations held under lease, is thereafter found unsuitable to continue with such businesses. We trust the state will be equally mindful of such differences. *State of Nevada* v. *Rosenthal*, 93 Nev. 36, 559 P.2d 830 (1977). In any event, under the worst scenario, appellants would not be foreclosed from continued retail operations at non-gaming locations and their existing shops presumably could be sold.

Lastly, appellants complain of a discriminatory application of NRS 463.160(8)(a) in violation of the equal protection clauses of our state and federal constitutions. Appellants argue that they have been singled out of a large class and, unlike the remainder of the class, subjected to a determination of suitability. This argument is unsound. All members of the class to which the statute is directed are subject to the requirement of a suitability determination. It is of no constitutional moment that appellants have been ordered to apply for a determination of suitability whereas others within the class have not. We have previously upheld the discretionary power of the

Commission. *State* v. *Rosenthal, supra.* Gaming control would be intolerably burdened if selective investigation were disallowed. The statutory scheme provides a basis for requiring suitability determinations when, for whatever reason, gaming authorities have concern over the activities of those who share space with gaming establishments. The power to confirm or allay such concerns through selective investigation and qualification represents an important aspect of control which the legislature has deemed to be vital to the maintenance of our gaming economy. We hold that the class created by NRS 463.160 (8)(a) is reasonable and necessary to the fulfillment of a legitimate legislative purpose and that the statute does not discriminate against appellants.

Appellants have attempted to raise issues in their reply brief which were not asserted in the district court or in their opening brief. These we decline to consider. *Phillips* v. *Mercer,* 94 Nev. 279, 579 P.2d 174 (1978); *Feldman* v. *State of Nevada,* 96 Nev. 614, 615 P.2d 238 (1980).

Other issues raised on appeal but not discussed in this opinion have been determined to be without merit.

For the reasons above stated, we affirm as qualified, the decision of the district court in holding that NRS 463.160(8)(a) is constitutional (Case No. 13217), but we reverse as to the district court's jurisdiction to enjoin its enforcement (Case No. 12946).

/s/ *Steffen,* J.
Steffen

We concur:

/s/ *Gunderson,* C.J.
Gunderson

/s/ *Manoukian,* J.
Manoukian

/s/ *Springer,* J.
Springer

/s/ *Mowbray,* J.
Mowbray

IN THE SUPREME COURT
OF THE STATE OF NEVADA

CASE NO. 12946

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION; and STATE OF NEVADA GAMING CONTROL BOARD,

Appellants,

v.

FRED J. GLUSMAN and
INTERNATIONAL DRESS SHOP, INC.,

Respondents.

CASE NO. 13217

FRED J. GLUSMAN and
INTERNATIONAL DRESS SHOP, INC.,

Appellants,

v.

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION; and STATE OF NEVADA GAMING CONTROL BOARD,

Respondents.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that FRED J. GLUSMAN and INTERNATIONAL DRESS SHOP, INC., respondents in Case No. 12946 and appellants in Case No. 13217, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of

Nevada, reversing the grant of injunctive relief in Case No. 12946 and affirming, as qualified, the constitutionality of §463.160(8)(a) of the Nevada Revised Statutes (Case No. 13217), entered in these consolidated actions on September 30, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ *Stephen M. Glynn*
Stephen M. Glynn

SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

GEORGE E. GRAZIADEI, ESQ.
SCOTT MICHAEL CANTOR, ESQ.
Penthouse Suite
101 Convention Center Drive
Las Vegas, Nevada 89109
(702) 385-0711
Counsel for Appellants

Office Of
CLERK OF THE SUPREME COURT
Capitol Complex
Carson City, Nevada 89710

November 30, 1982

To: Honorable Richard H. Bryan, Attorney General
Patricia W. Becker, Chief Deputy Attorney General
Nikolas L. Mastrangelo, Deputy Attorney General
Messers. Shellow, Shellow & Glynn
George E. Graziadei, Esq.
Frank W. Daykin, Legislative Counsel
Honorable Loretta Bowman, Clerk

Re: State of Nevada v. Glusman, No. 12946.
Glusman v. State of Nevada, No. 13217.

You are hereby notified that I have this day received and filed the following:

Notice of Appeal to the Supreme Court of the United States.

jcr

C. R. Davenport, *Clerk*

Supreme Court, U.S.
FILED
FEB 7 1983
ALEXANDER L. STEVAS,
CLERK

82-1100

No. 82–110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRED J. GLUSMAN and
INTERNATIONAL DRESS SHOP, INC.,
Appellants,

v.

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION; and STATE OF NEVADA GAMING CONTROL BOARD,
Appellees.

On Appeal From the Supreme Court of Nevada

MOTION TO DISMISS OR AFFIRM

BRIAN McKAY
Attorney General of
the State of Nevada

BY: NIKOLAS L. MASTRANGELO
Deputy Attorney General
Gaming Division
Building D, Suite 880
4220 South Maryland Parkway
Las Vegas, Nevada 89158
Telephone: (702) 731-3150
Counsel for Appellees

Date: January 24, 1983

TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES.....	ii
QUESTIONS PRESENTED BY THIS MOTION.....	2
OPINION BELOW.....	2
PROVISIONS OF STATE LAW INVOLVED.....	3
STATEMENT OF THE CASE.....	9
SUMMARY OF ARGUMENT.....	13
ARGUMENT.....	14
I. POINT I.....	14
II. POINT II.....	17
CONCLUSION.....	21

TABLE OF CASES AND AUTHORITIES

Cases

	Page
Costarelli v. Massachusetts, 421 U.S. 193 (1975).....	15
Hoffman Estates v. Flipside, Hoffman Estates, 102 S.Ct. 1186, 71 L.Ed.2d 262 (1982).....	17
In Re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 434 A.2d 1111 (App. Div. 1981), affirmed, 90 N.J. 361, 447 A.2d 1335 (1982).....	19
Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962).....	15
Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).....	16
Monarski v. Alexandrides, 362 N.Y.S.2d 976 (N.Y. Super. 1974)...	20
Perlman v. New Jersey Attorney General, 51 U.S.L.W. 3459 (U.S. December 13, 1982) (No. 82-691).....	20
Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62 (1948).....	15, 16
State ex rel. Pitkanen v. Zittel, 462 P.2d 944 (Sup. Ct. of Washington en banc 1969).....	20

Page

State v. Glusman,
651 P.2d 639 (Nev. 1982)..... 2, 17

State v. Rosenthal,
93 Nev. 36, 559 P.2d 830 (1977),
appeal dismissed,
434 U.S. 803 (1977)..... 21

United States v. Polizzi,
500 F.2d 856 (9th Cir. 1974),
cert. denied, 419 U.S. 1420 (1975).... 20

Statutes

Nevada Revised Statutes

NRS 463.0129..... 3, 10

NRS 463.130..... 3

NRS 463.1405..... 5

NRS 463.160(8)..... 4, 11

NRS 463.167..... 12

NRS 463.167(2)..... 4, 11

NRS 463.167(3)..... 4, 11

NRS 463.170..... 12, 20

NRS 463.170(1)..... 6, 18

NRS 463.170(2)..... 6, 18

NRS 463.170(3)..... 6

NRS 463.170(4)..... 6

Regulations

Page

Nevada Gaming Commission and
State Gaming Control Board Regulations

3.080..... 8

3.090..... 8

Rules Cited

Rules of the Supreme Court
of the United States

16(1)(a)..... 2

16(1)(b)..... 2

16(1)(d)..... 2

No. 82-110

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

FRED J. GLUSMAN and
INTERNATIONAL DRESS SHOP, INC.,

Appellants,

v.

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION; and STATE OF NEVADA GAMING CONTROL BOARD,

Appellees.

On Appeal From the Supreme Court of Nevada

MOTION TO DISMISS OR AFFIRM

Appellees, the State of Nevada; State of Nevada Gaming Commission; and State of Nevada Gaming Control Board, respectfully move to dismiss the appeal herein or in the alternative, to affirm the opinion of the Nevada Supreme Court on the grounds that the proceedings appealed from lack finality, and that the issues

raised by the appellants do not present a substantial federal question. Rule 16(1)(a), (b) and (d).

QUESTIONS PRESENTED BY THIS MOTION

1. Should the Court consider the instant challenge to Nevada's statutory standards for a gaming license or finding of suitability when subsequent to the filing of the notice of appeal to this Court, the appellant filed his application for a finding of suitability with the State Gaming Control Board, and a decision on this application has not yet been made?

2. Does the challenge to Nevada's statutory and regulatory standards which will be used to determine Glusman's ability to do business on the premises of licensed gaming establishments fail to present a substantial federal question?

OPINION BELOW

The opinion of the Nevada Supreme Court from which the instant appeal has been taken is reported at 651 P.2d 639.

PROVISIONS OF STATE LAW INVOLVED

NRS 463.0129 (formerly NRS 463.130):

1. The legislature hereby finds, and declares to be the public policy of this state, that:

(a) The gaming industry is vitally important to the economy of the state and the general welfare of the inhabitants.

(b) The continued growth and success of the gaming industry is dependent upon public confidence and trust that licensed gaming is conducted honestly and competitively and that the gaming industry is free from criminal and corruptive elements.

(c) Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture or distribution of gambling devices and equipment.

(d) All establishments where gaming is conducted and where gambling devices are operated, and manufacturers, sellers and distributors of certain gambling devices and equipment in the state shall therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the state, to foster the stability and success of the gaming industry and to preserve the competitive economy and policies of free competition of the State of Nevada.

2. No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval

sought. Any license issued or other commission approval granted pursuant to the provisions of this chapter or chapter 464 of NRS is a revocable privilege, and no holder acquires any vested right therein or thereunder.

NRS 463.167(2) and (3) (formerly NRS 463.160(8)):

2. If the premises of a licensed gaming establishment are directly or indirectly owned or under the control of the licensee therein, or of any person controlling, controlled by, or under common control with the licensee, the commission may, upon recommendation of the board, require the application of any person for a determination of suitability to be associated with a gaming enterprise if the person:

(a) Does business on the premises of the licensed gaming establishment;

(b) Does business with the licensed gaming establishment as a junket representative or ticket purveyor; or

(c) Provides any goods or services to the licensed gaming establishment for a compensation which the board finds to be grossly disproportionate to the value of the goods or services.

3. If the commission determines that the person is unsuitable to be associated with a gaming enterprise, the association must be terminated. Any agreement which entitles a business other than gaming to be conducted on the premises, or entitles a person other than gaming to conduct business with the licensed gaming establishment as set forth in

paragraph (b) or (c) of subsection 2, is subject to termination upon a finding of unsuitability of the person associated therewith. Every such agreement must be deemed to include a provision for its termination without liability on the part of the licensee upon a finding by the commission that the person associated therewith is unsuitable to be associated with a gaming enterprise. Failure expressly to include that condition in the agreement is not a defense in any action brought pursuant to this section to terminate the agreement. If the application is not presented to the board within 30 days following demand or the unsuitable association is not terminated, the commission may pursue any remedy or combination of remedies provided in this chapter.

NRS 463.1405:

1. The board shall investigate the qualifications of each applicant under this chapter before any license is issued or any registration, finding of suitability or approval of acts or transactions for which commission approval is required or permission is granted, and shall continue to observe the conduct of all licensees and other persons having a material involvement directly or indirectly with a licensed gaming operation or registered holding company to ensure that licenses are not issued or held by, nor is there any material involvement directly or indirectly with a licensed gaming operation or registered holding company by unqualified, disqualified or unsuitable persons, or persons whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places or locations.

2. The board has full and absolute power and authority to recommend the denial of any

application, the limitation, conditioning or restriction of any license, registration, finding of suitability or approval, the suspension or revocation of any license, registration, finding of suitability or approval or the imposition of a fine upon any person licensed, registered, found suitable or approved for any cause deemed reasonable by the board.

3. The commission has full and abolute [sic] power and authority to deny any application or limit, condition, restrict, revoke or suspend any license, registration, finding of suitability or approval, or fine any person licensed, registered, found suitable or approved, for any cause deemed reasonable by the commission.

NRS 463.170(1)-(4):

1. Any person who the commission determines is qualified to receive a license or be found suitable under the provisions of this chapter, having due consideration for the proper protection of the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and the declared policy of this state, may be issued a state gaming license or found suitable. The burden of proving his qualification to receive any license or be found suitable is on the applicant.

2. An application to receive a license or be found suitable shall not be granted unless the commission is satisfied that the applicant is:

(a) A person of good character, honesty and integrity;

(b) A person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto; and

(c) In all other respects qualified to be licensed or found suitable consistently with the declared policy of the state.

3. A license to operate a gaming establishment shall not be granted unless the applicant has satisfied the commission that:

(a) He has adequate business probity, competence and experience, in gaming or generally; and

(b) The proposed financing of the entire operation is:

(1) Adequate for the nature of the proposed operation; and

(2) From a suitable source.

Any lender or other source of money or credit which the commission finds does not meet the standards set forth in subsection 2 may be deemed unsuitable.

4. An application to receive a license or be found suitable constitutes a request for a determination of the applicant's general character, integrity, and ability to participate or engage in, or be associated with gaming. Any written or oral statement made in the course of an official proceeding

of the board or commission by any member thereof or any witness testifying under oath which is relevant to the purpose of the proceeding is absolutely privileged and does not impose liability for defamation or constitute a ground for recovery in any civil action.

Regulation 3.080 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board:

The commission may deny, revoke, suspend, limit, condition, or restrict any registration or finding of suitability or application therefor upon the same grounds as it may take such action with respect to licenses, licensees and licensing; without exclusion of any other grounds. The commission may take such action on the grounds that the registrant or person found suitable is associated with, or controls, or is controlled by, or is under common control with, an unsuitable person.

Regulation 3.090 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board:

1. No license, registration, finding of suitability, or approval shall be granted unless and until the applicant has satisfied the commission that the applicant:

(a) Is a person of good character, honesty, and integrity;

(b) Is a person whose background, reputation and associations will not result

in adverse publicity for the State of Nevada and its gaming industry; and

(c) Has adequate business competence and experience for the role or position for which application is made.

2. No license, registration, finding of suitability, or approval shall be granted unless and until the applicant has satisfied the commission that the proposed funding of the entire operation shall be (a) adequate for the nature of the proposed operation, and (b) from a suitable source. The suitability of the source of funds shall be determined by the standards enumerated in paragraph 1(a), (b) and (c) above.

STATEMENT OF THE CASE

This case involves a decision by the State of Nevada to require appellant, Fred J. Glusman, to file an application for a finding of suitability to do business on the premises of licensed gaming establishments. Appellant Glusman is an officer, director and sole shareholder of appellant, International Dress Shop, Inc. through which he conducts said business.

The gaming laws of Nevada are administered by two agencies created by the Legislature, the Nevada Gaming Commission (hereinafter Commission) and the State Gaming Control Board

(hereinafter Board). These agencies are charged with enforcing the declared public policy of the State which requires "strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments . . . [and that] [a]ll establishments where gaming is conducted . . . be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the state, ..." NRS 463.0129.

The Board is composed of three full-time members and employs a large staff of investigators, analysts, accountants and other experts to monitor and police, on a day-to-day basis, all gaming operations and establishments in the State. The Commission is a five-member body, also charged with administering the State's gaming laws, which meets at least monthly and in certain matters is responsible for acting upon recommendations of the Board. One such area is the decision of whether to require an investiga-

tion to determine the suitability of an individual who does business on premises where licensed gaming is conducted and if so, the ultimate determination on the issue of suitability. NRS 463.167(2) and (3) is an important tool of the Board and Commission in discharging their responsibility to police the gaming industry.[1]

On June 6, 1980, a letter was sent to appellant Glusman by the Board directing him to file an application for a determination of suitability within 30 days. In an effort to avoid filing said application, Glusman filed a complaint for declaratory relief in the State court which leveled a barrage of constitutional challenges to what is now NRS 463.167(2). Following the issuance of a formal order by the Commission, which again required Glusman to

---

1. NRS 463.167(2) and (3) previously set forth on pages 4-5, is referred to in the opinion below and in the jurisdictional statement under its former designation, NRS 463.160(8).

file the aforementioned application, appellant obtained a preliminary injunction by the court which prohibited the Commission from enforcing its order until the issues raised in his complaint had been resolved.[2]

On February 27, 1981, the trial court issued findings of fact and conclusions of law, and a judgment upholding the constitutionality of NRS 463.167.[3] Appellants then appealed to the Nevada Supreme Court who, on September 30, 1982, affirmed the findings of the constitutionality of NRS 463.167 with the proviso that the costs of investigation could not constitutionally be imposed upon the appellant Glusman.

---

2. Because of the paramount State interest in unhindered, effective gaming enforcement, the opinion of the Nevada Supreme Court held that the trial court was without jurisdiction to issue the preliminary injunction.

3. The constitutionality of NRS 463.170 which is challenged herein was never challenged or even mentioned in the trial court proceedings or in the appellants' opening brief to the Nevada Supreme Court.

On November 18, 1982, after filing a notice of appeal to this Court, and being denied a stay from this Court of the State administrative proceedings, Glusman filed his application for a determination of suitability as previously ordered by the Commission. An investigation of Glusman on said application is currently in progress and a determination thereon will be made upon completion of the investigation. Pending said determination, Glusman is permitted to continue operating his business on licensed gaming premises and if found suitable, will enjoy this privilege in the future.

SUMMARY OF ARGUMENT

Since the effect of the decision of the Nevada Supreme Court was to revest jurisdiction in the Board and Commission to conduct the investigation and determination of the suitability of Glusman which is currently in progress, the proceedings lack the requisite finality for review in this Court.

The appellants' vagueness challenge to the statutory and regulatory standards which will be applied to determine appellant Glusman's suitability to continue to operate his businesses on the premises of licensed gaming establishments, does not present a substantial federal question. The standards, in any event, are clearly sufficient to pass constitutional muster as economic regulation, and are not unconstitutionally vague.

ARGUMENT

I. POINT I.

The instant appeal is premature in that the administrative proceedings below lack finality and appellants have failed to exhaust their administrative remedies.

This Court has recognized that where state administrative proceedings have been interrupted by state courts only to be returned for administrative consideration of the significant issues, an appeal to the United States Supreme Court lacks requisite finality and is subject to

dismissal. Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62 (1948). "This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern." Id. at 67. (Emphasis added.) It would be difficult to imagine a matter of more peculiarly local concern than that of gaming regulation to the State of Nevada. See, e.g., the concurring opinion of Judge Pope in Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962).

The finality requirement is not only designed to avoid the evils of piecemeal review, but to spare the nation's highest court from reviewing cases which could be resolved by a decision favorable to the appellant below, and to avoid unnecessary interference in ongoing state proceedings. Republic Natural Gas Co. v. State of Oklahoma, supra; Costarelli v. Massachusetts, 421 U.S. 193 (1975).

In the instant case, since the ultimate issues in the administrative proceedings have yet to be determined regarding Glusman's ability to continue doing business on the premises of licensed gaming establishments, a determination favorable to Glusman may render his challenge herein moot.

In Republic, supra, this Court further declared that "the incurring of some loss, before a process preliminary to review here is exhausted, is not in itself sufficient to authorize our intervention." Id. at 70. In any event, the Nevada Supreme Court's opinion precludes the State from imposing the costs of its investigation on Glusman.

The oft quoted phrase from Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 (1938), applies with equal force to the instant case: "No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

II. POINT II.

The instant appeal does not present a substantial federal question.

The statutory and regulatory standards which the appellants have challenged as unconstitutionally vague are those which will be used to determine whether appellant Glusman will be permitted to continue to do business on premises where licensed gambling is conducted. These provisions are not criminal in nature, nor do they impact upon conduct protected by the First Amendment. They constitute purely economic regulation designed to effectuate the compelling State interest in effective gaming control.[4]

Assuming arguendo, that appellants can demon-

---

4. The opinion of the Nevada Supreme Court points out that the test for measuring such economic regulation against vagueness challenges, as recently reaffirmed by this Court, is much more relaxed than the test for criminal statutes or those that have an impact on First Amendment freedoms. State v. Glusman, 651 P.2d 639, 645 (Nev. 1982), citing Hoffman Estates v. Flipside, Hoffman Estates, 102 S.Ct. 1186, 71 L.Ed.2d 262 (1982).

strate a federally protected right to operate a business on premises where licensed gambling is conducted, the authorities cited in their jurisdictional statement do little to support the question presented therein. After quoting from "Board guidelines," which were repealed in 1978, the appellants cite cases in support of their challenge which do not involve licensing standards whatsoever, let alone licensing statutes sharing common terms. A legislative enactment of a state which deals with a matter of such vital and local concern as the regulation of licensed gaming in Nevada should not be so easily undone.

The challenged statute provides, in part, as follows (NRS 463.170(1)-(2)(b)):

> 1. Any person who the commission determines is qualified to receive a license or be found suitable under the provisions of this chapter, having due consideration for the proper protection of the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and the declared policy of this state, may be issued a state gaming license or found suitable. The burden of proving his qualification to

receive any license or be found suitable is on the applicant.

2. An application to receive a license or be found suitable shall not be granted unless the commission is satisfied that the applicant is:

(a) A person of good character, honesty and integrity;

(b) A person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto; . . . .

(Emphasis added.)

Virtually, identical standards were found to lend specificity and clarity in overcoming a vagueness challenge in State v. Rosenthal, 93 Nev. 36, 559 P.2d 830 (1977), appeal dismissed, 434 U.S. 803 (1977). Additionally, the standard of "good character, honesty and integrity" was upheld against a vagueness challenge in In Re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 434 A.2d 1111 (App. Div. 1981), affirmed, 90 N.J. 361, 447 A.2d 1335

(1982), appeal dismissed sub nom. Perlman v. New Jersey Attorney General, 51 U.S.L.W. 3459 (U.S. December 13, 1982) (No. 82-691). The same result should be reached in the instant case.

The appellees submit that NRS 463.170, standing alone, is not unconstitutionally vague.[5] Even if it were, however, the statutory scheme presented on pages 3-8 herein, considered as a whole, is more than sufficient to guide the State gaming regulators in the area of qualifications for a gaming license or finding of suitability. "These Nevada statutes form a unified legislative plan; particular sections cannot be fully understood without relating them to the entire statutory scheme." United States v. Polizzi, 500 F.2d 856, 875 (9th Cir. 1974),

---

5. Indeed, licensing statutes using merely the standard of "good character" or "good moral character" without further amplification have been held not unconstitutionally vague. State ex rel. Pitkanen v. Zittel, 462 P.2d 944 (Sup. Ct. of Washington en banc 1969); Monarski v. Alexandrides, 362 N.Y.S.2d 976 (N.Y. Super. 1974).

cert. denied, 419 U.S. 1420 (1975). It is further appropriate to consider the administrative regulations if the statutes are inadequate. State v. Rosenthal, supra. Taken as whole, these provisions, without question, provide sufficient standards to determine an individual's suitability to do business on premises where licensed gaming is conducted.

CONCLUSION

For the foregoing reasons, appellees respectfully submit that the proceedings appealed from herein lack requisite finality, and that in any event, the federal question on which this case depends is so manifestly unsubstantial as not to require further argument and that, therefore, this appeal should be dismissed, or in the alternative, that the

opinion of the Nevada Supreme Court should be affirmed.

DATED: January 24, 1983.

Respectfully submitted,

BRIAN McKAY
Attorney General of
the State of Nevada

BY: NIKOLAS L. MASTRANGELO
Deputy Attorney General
Gaming Division
Building D, Suite 880
4220 South Maryland Parkway
Las Vegas, Nevada 89158

Counsel for Appellees